

The Unborn Child in Canadian Law

Karen M. Weiler

Katherine Catton

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Article

Citation Information

Weiler, Karen M. and Catton, Katherine. "The Unborn Child in Canadian Law." *Osgoode Hall Law Journal* 14.3 (1976) : 643-659.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol14/iss3/4>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

THE UNBORN CHILD IN CANADIAN LAW

By KAREN M. WEILER*
and
KATHERINE CATTON**

The unborn child has for many purposes been recognized and accorded varying degrees of protection by the law. Advances in scientific knowledge, changing social mores, and proposed recent developments in the legal framework relating to the unborn would extend these protections. This paper offers a summary of the legal position of the unborn child in Canadian law in relation to the law of property and the right to inherit, the criminal law, the law of contracts and maintenance, and claims for tortious liability. It seeks to establish and evaluate the extent to which a coherent legal policy has developed with respect to the unborn child.

A. THE LAW OF PROPERTY

A child *en ventre sa mere* is a person in being for the purpose of the acquisition of property by the child itself, and being a "life in being" chosen to form part of the period in the rule against perpetuities.¹

When a testator makes a bequest in his will to his "surviving children" or "all living children," a child *en ventre sa mere* is entitled to inherit, if it is to his benefit to do so, and provided he is subsequently born alive.²

In construing a will in such cases, the court is entitled to put itself in the position of the testator and to consider the intention evidenced by the words used.³ Thus, if the court finds that the potential existence of such child placed it plainly within "the reason and motive of such gift" the court will resort to a legal fiction and construe the will so as to include the child by finding him alive at the relevant date.⁴ This fiction is not applicable when the result would be detrimental to the infant.⁵

© Copyright, 1976, Karen M. Weiler and Katherine Catton.

* Karen M. Weiler is Counsel for the Ministry of the Attorney General of Ontario, Policy Development Division.

** Katherine Catton is Legal Research Co-ordinator for the Child in the City Program, University of Toronto.

¹ P. H. Winfield, *The Unborn Child* (1942), 4 U. of T. L. J. 278 at 279; see, also, *The Perpetuities Act*, R.S.O. 1970, c. 343, s. 1(b).

² *Re Sloan Estate*, [1937] 3 W.W.R. 455 (B.C.S.C.) at 463.

³ *Id.* at 458.

⁴ *Id.* at 463; *Re Charlton*, [1919] 1 W.W.R. 134 (Man.) Kings Bench.

⁵ *Supra*, note 1. Winfield also states that in connection with the perpetuity rule the fiction holds whether it be for the advantage of the unborn or not; see *Blasson v. Blasson* (1864), 2 Dc. G. J. & S. 665 for an example of such a case.

Where the testator specifically names those persons who are to inherit under his will, is the unborn child still included? In *Re Sloan Estate*,⁶ the testator made a will leaving his property in equal shares to his wife and three infant children all of whom he then named specifically. Four months after the testator died, a fourth child of the marriage was born. Manson, J. of the British Columbia Supreme Court, after reviewing the will, observed that the description by name of the beneficiaries was mere draftsman's style and, in the case of the wife, quite unnecessary and superfluous. He then came to the conclusion that the gift in the will was not really a gift to designated persons but to a composite class of the deceased's immediate dependants.⁷ On this basis, the posthumous daughter was found entitled to inherit.

In giving judgment, Manson, J. noted that although he had been referred to a number of English authorities,⁸ including *Elliott v. Joicey*,⁹ a controversial decision of the House of Lords taken to be binding on Canadian Courts,¹⁰ none of these cases contained exactly the language in the testamentary document before him.¹¹ He therefore concluded that:

1. We give particular phrases certain meanings because the phrase has a common meaning which testators of the same country would have meant by the use of the same language:

That it would be open to a Court in Australia to put one meaning upon a phrase and to a Court in Canada to put another meaning upon the same phrase, I think, is beyond dispute and there is no phrase so crystallized in its legal meaning that its meaning may not be varied by its context in the will;¹²

2. The authorities upon this subject are extremely difficult to reconcile and the only sensible thing to do is to strive to avoid a conclusion which would work an obvious injustice to those "morally entitled" to inherit;¹³

3. In construing a will, it may be necessary to depart from the strict interpretation of words used by a testator:

The inclination of the modern Court is to be bound even less than in the past by literal interpretations which would do injustice if applied.¹⁴

4. If the ordinary and natural meaning of the words of the will were to be given effect, the child would be excluded from the benefits of the will as not having been in contemplation at the time the will was made. Even if the Court is entitled to put itself in the position of the testator and to consider the intention evidenced by his words, the posthumous child might not benefit by considering him as alive at his father's death,

⁶ *Supra*, note 2 at 455.

⁷ *Id.*

⁸ *In re Griffith's Settlement*, [1911] 1 Ch. 246; *Villar v. Gilbey*, [1907] A.C. 139.

⁹ [1935] A.C. 209. This case has been discredited by the House of Lords in England.

¹⁰ *C. Wright, Case and Comment: Elliott v. Joicey* (1935), 13 C.B.R. 594 at 598.

¹¹ *Supra*, note 2 at 463.

¹² *Id.*

¹³ *Id.* at 460.

¹⁴ *Id.*

because his father might have completely disinherited him by will.¹⁵ However, to proceed upon the supposition that the testator, having in mind the possibility of a posthumous child, deliberately intended to exclude him, would be to impute to the testator a malevolent or fraudulent motive.¹⁶ This the Court would not do.¹⁷

5. The testator knew nothing of the artificial rule of construction that applies in the case of a posthumous child and based upon the date of the will and the subsequent date of birth of the child, he could not have had the posthumous child in contemplation.¹⁸

For these reasons an artificial meaning may be placed upon the testator's words which will bring the child within the ambit of the gift when it is to his benefit to do so, provided he is subsequently born alive.¹⁹

B. THE CRIMINAL LAW

Two aspects of the criminal law relate to the unborn child: the law of homicide, and the question of abortion.

Historically, the unborn child could not be the victim of murder. In 1648, Sir Edward Coke observed:

If a woman be quick with childe, and by a potion or otherwise killeth it, in her wombe, or if a man beat her, whereby the child dyeth in her body, and she is delivered of a dead childe, this is a great misprison [misdemeanour] and no murder; but if the child be born alive and dyeth of the potion, battery or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.²⁰

But in *R. v. Sims*, it was held that if the child is "born living and the wounds appear in his body, and then dye, the batteror shall be arraigned for murder for now it may be proved whether these wounds were the cause of death or not and for that if it be found, he shall be condemned."²¹

At common law, the abortion of an unborn child before quickening was no crime at all if the woman consented. If the woman did not consent, the offence was an assault on the woman.²² These two common law rules, that

¹⁵ *Supra*, note 10 at 599; In the *Elliott* case much was made of this fact.

¹⁶ *Supra*, note 2 at 461.

¹⁷ *Supra*, note 10 at 599; Wright also suggests that since a child can make a claim as a dependant when he has been left out of a will under the law of most provinces in Canada, even if a child has been cut out of his father's will he could still benefit financially.

¹⁸ *Supra*, note 2 at 461.

¹⁹ However, the relevant date for ascertaining the members of the class will not be delayed, *id.* at 465.

²⁰ 3 Coke, Institutes 58 (1648).

²¹ Decided in 1601. A brief report appears in Goldsborough 176. See also *R. v. Kwok Chak Ming* — Criminal Session Case 4/63 Hong Kong, and *R. W. Cannon*, "Born Alive" (1963), *Crim. L. R.* 748.

²² W. J. Maledon, *The Law and the Unborn Child: The Legal and Logical Inconsistencies* (1971), 46 *Notre Dame Lawyer* 349 at 363.

killing the quickened child in the womb was a misdemeanour and not a felony, and that if the child were born alive and then died of an intentionally delivered prenatal injury, this was murder, have been enacted in modified form in the homicide provisions of our *Criminal Code*.²³ Section 205 defines homicide generally; s. 206(2) states that:

A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

Subsection (1) defines when a child becomes a human being for the purposes of criminal law:

A child becomes a human being . . . when it has completely proceeded, in a living state, from its mother whether or not

- a) it has breathed
- b) it has an independent circulation, or
- c) the navel string is severed.

Section 212 then specifies when homicide is considered murder by defining the intent or recklessness required. Thus, live birth is an absolute requirement to sustain a charge of homicide.

Section 221 modifies the common law rules in that now, to kill an unborn child in the act of birth is an indictable offence, but not homicide. At common law this was only a misdemeanour. This provision, however, does not apply to a person who, in good faith, causes the death of such child where he considers it necessary to preserve the life of the mother. Here, where there is a clear conflict between maintaining the mother's life and permitting the child to be born alive, the policy decision expressed in the statute shows a preference for preserving the existing life. This section implies that the mother's right to continued life prevails over the unborn child's right to life.

Section 226 further modifies the common law. By this section, a pregnant woman about to give birth who intends that her child shall not live and therefore fails to obtain the necessary assistance is guilty of an indictable offence, even if her child dies immediately before or during birth (that is, without having yet been born alive) rather than only if the child dies after birth. The infanticide provision found in s. 216 does not extend the common law for it applies only to a newly born child who is already a human being.

As previously stated, at common law, killing the unborn before quickening, as by abortion, was no offence at all unless done without the mother's consent, in which case it was an assault on her. After quickening, abortion was a misdemeanour only if the child was not born alive. In our present abortion legislation, as in that of many other jurisdictions, the woman herself can only commit the crime of abortion if she is actually pregnant, while other persons can commit the crime of abortion if they have the requisite intent, regardless of whether or not the woman is pregnant. Many writers feel that this form of legislation indicates that the main purpose of such abortion provisions was originally to protect women from the dangers associated with

²³ R.S.C. 1970, c. C-34.

abortion.²⁴ Others argue, however, that the real thrust of such legislation was to protect the unborn child.²⁵

Section 251 of the *Criminal Code* states that it is an indictable offence to carry out an abortion except where

a qualified medical practitioner . . . in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person . . .

after the hospital's therapeutic abortion committee has given appropriate approval.²⁶ This committee is to decide whether "in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health."²⁷

Again in these abortion provisions a preference is expressed for the extant life of the mother over the potential life of the unborn. When the mother's right to health or life is threatened by the continued life of the fetus, she has the right to defend herself by having its existence terminated.

These abortion and homicide provisions in the *Criminal Code* indicate that the law does not hold the life of the fetus in as high regard as that of a living person for, if it did, the procurement of an abortion not done in self-defence would be viewed as the premeditated taking of one life by another, and hence murder — which it is not.²⁸ A possible explanation of the abortion provisions is that the law is extending its protection to the potentiality of human life, but that when the potentiality of life conflicts with rights of those actually living, the rights of the latter will prevail. However, the recent controversy engendered by the case of *Morgentaler v. The Queen*²⁹ has undoubtedly made lawmakers aware that a large segment of society does not share this view and regards it as an unfair imposition of morality by the law. Even accepting that the potentiality of life should be protected unless it conflicts with the life or health of the mother, it can be argued that consideration should be given to updating the law to reflect the fact that, owing to medical advances, the risk to a woman's life by abortion in the first trimester of pregnancy is less than the risk to her life of full term pregnancy and childbirth.³⁰

C. THE LAW OF CONTRACT AND MAINTENANCE

In general, a child has a right to be maintained by his parents upon whom he will obviously be dependent in his early stages for the "necessaries of life." The failure or inability of a parent to maintain his child can lead to child protection proceedings being taken.

²⁴ *Supra*, note 22 at 364.

²⁵ *Id.*

²⁶ *Criminal Code*, s. 251 (4)(a).

²⁷ *Id.* at s. 251 (4)(c).

²⁸ N. Shapiro-Libai, *The Right to Abortion*, Paper presented at the 18th International Convention of F.I.D.A., 1975 at 7.

²⁹ (1975), 53 D.L.R. (3d) 161.

³⁰ *Id.* at 8.

Winfield has stated that he can think of no instance in which contract is possible on the part of the unborn child, not even in those circumstances where a lunatic or minor would be bound if he made the contract. The difficulty, he observes, is whether a potentiality which may never become an actuality is capable of contracting.⁸¹

While contracts entered into by an infant are considered void or voidable, one exception created to this rule occurs where the infant contracts for the necessities of life.⁸² One can hypothesize that the reason for this exception is not a recognition of any legal capacity in an infant to enter into a contract; rather, the protection afforded to third parties of being able to collect on the contract later on serves as an inducement to them to assist a child. If this view is taken, the right of the infant to contract for necessities can be seen as an extension of his right to maintenance. In British Columbia, *The Family Relations Act*⁸³ extends the right to third parties to claim support and maintenance on behalf of a child.

Does the unborn child have a similar right to maintenance? Many would say this depends on whether the unborn child has a right to be born. But assuming that a pregnant woman wishes to carry her child to term, does that unborn child have any right to support from others?

Typically, the issue of maintenance will not arise. However, in Ontario and other provinces as well, when it appears that a child is *likely to be born* or is born out of wedlock and no agreement between the mother and the putative father with respect to the care and maintenance of the child is in force, a Children's Aid Society and the mother of the child may enter into an agreement with the putative father.⁸⁴ Where no agreement has been entered into, an application may be made to a judge for an affiliation order stating that the putative father is in fact the child's father and liable to maintain him.⁸⁵ Among those entitled to apply for such an order are the mother of the child likely to be born out of wedlock, a Children's Aid Society, or, with the approval of a society, any person or municipality which has expended money in consequence of the mother's pregnancy.⁸⁶ It can be argued that an order relating to "the reasonable expenses for the maintenance, care, medical and otherwise, of the mother of the child during her pregnancy and at the birth of the child . . . and the burial expenses of the child if the child dies"⁸⁷ is an order of maintenance for the mother and not for the child.

However, the fact that the Children's Aid Society may initiate the making of an order would appear to offer some support for the alternative argument that, in reality, it is the interests of the unborn child and not just the mother's

⁸¹ *Supra*, note 1 at 284.

⁸² J. E. Cote, *An Introduction to the Law of Contract*, (Edmonton: Juriliber Ltd., 1974) at 80, see also R.S.B.C. 1960, c. 193.

⁸³ *The Family Relations Act*, S.B.C. 1972, c. 20, ss. 19, 25.

⁸⁴ *The Child Welfare Act*, R.S.O. 1970, c. 64, s. 50(1) as amended.

⁸⁵ *Id.*, s. 51.

⁸⁶ *Id.*

⁸⁷ *Id.*, s. 59(1)(a).

interests which are being safeguarded. This reasoning is further supported by the fact that third parties and municipalities may obtain reimbursement from the putative father for expenses "charged in consequence of the mother's pregnancy." At common law, a man is not under any obligation to support a woman to whom he is not married. Thus, the right to reimbursement by third parties with respect to pregnancy expenses is somewhat analogous to the right to reimbursement when supplying necessaries to an infant and, again, the protection to creditors serves as an inducement to preserve the life of the fetus.

Although at the present time the child protection legislation of the various provinces does not appear to afford any other protections to the unborn child, the Family and Children's Law Commission of British Columbia sees a need for the prevention of child abuse prior to the birth of the child. The Commission states:

We have no jurisdiction to deal with abortion because it is a federal matter. However, once a woman has decided to bear the future infant, the laws of the province should emphasize individual responsibility to *provide the infant* with the kind of pre-natal care that will prevent unnecessary jeopardy to the child.

For example, a pregnant woman who knows she is suffering from syphilis can avoid congenital syphilis in her offspring if she will accept treatment within the first sixteen weeks of pregnancy. Likewise, if a woman requires frequent pre-natal visits for medical surveillance in order to detect and prevent complications that would lead to premature birth or some other predisposition to disease in the future child, it seems irresponsible for her to allow other considerations to take precedence over such a requirement for health care. Therefore, while there is much yet to be learned about maternal nutritional requirements and their variations during pregnancy, there is no question but that a gross deficit in protein intake will predispose the offspring to mental retardation. These kinds of harm can be prevented and we believe that the law should assist in that prevention.³⁸ [emphasis added]

Therefore, in new child-care legislation the British Columbia Commission thinks that the future infant should be protected. To do so, it envisages that the definition of children who are "in need of care" could extend to unborn children "when the mother has decided to carry her pregnancy to full term."³⁹ While the unborn child itself cannot be taken into care, the Commission envisages the next best thing — "a disposition could be made which places the mother under a supervision order."⁴⁰ It is evident that the Commission hopes to protect the child's future growth and development at the earliest stage. Such a provision would clearly be a recognition of the unborn child's rights to maintenance and normal development apart from the interests of the mother, although this is not a recognition of a right to life itself.

There is also the further issue of whether the putative father, since he is obligated to support the child before birth, should have a right to participate in any abortion decision. Some precedent for this view arises from the fact that in January, 1972 Mr. Justice Liefv granted an interim injunction to a

³⁸ Royal Commission on Family and Children's Law, *Report V: The Protection of Children* (Vancouver: March, 1975) at 65.

³⁹ *Id.* at 66.

⁴⁰ *Id.* at 65.

husband who sought to prevent his wife from obtaining an abortion even though she had obtained the requisite approval of the Hospital Committee for the abortion.⁴¹ The injunction, however, was later withdrawn on consent of both parties and it must be emphasized no final decision on the matter was rendered. Requirements such as these should be viewed with caution for they could severely restrict the rights and liberties of a living person, the mother, in favour of the potentiality of life in the unborn.

Divorce proceedings are another area where the issue of maintenance is likely to arise with respect to the making of an ancillary order for the maintenance of the "children of the marriage." This term "children of the marriage" is defined *in part* as, "each child of a husband and wife who *at the material time* is under the age of sixteen years."⁴² [emphasis added] If the child is born after the divorce of its parents, can it be said to be a child of "a husband and wife" on a strict legal interpretation of those words? Since the child was *conceived* during the marriage, it would be presumed to be legitimate and it would also, after birth, have a right to maintenance under provincial legislation. It might, however, be more convenient to deal with the maintenance question at the time of the making of the decree *nisi* since this would avoid the necessity of initiating separate proceedings later on and any order so made could, depending on the contingencies of life, be varied. Such an order would not be maintenance of the unborn child *per se* but simply a recognition of its potential right contingent upon its live birth. No Canadian case to date has ever dealt with this point.⁴³

The next question to be considered is whether an unborn child is entitled to be considered a "dependant" within the meaning of Workmen's Compensation legislation and Fatal Accidents Acts and as such, within the group of persons entitled to share in damages awarded for the loss of life or wrong done to the family's provider. In *Chapman v. C.N.R.*,⁴⁴ a separate award was made under *The Workmen's Compensation Act*⁴⁵ and then subrogated under *The Fatal Accidents Act*⁴⁶ on behalf of the infant plaintiff who was *en ventre sa mere* at the time his father was killed. The entitlement of the infant to

⁴¹ *The Globe and Mail* January 28, 1972, Editorial — "An Abortion Judgement that must be Appealed"; January 29, 1972 — "Abortion Injunction Does Not Set Precedent"; February 5, 1972 — "Woman Wants No-Abortion Order Ended"; February 9, 1972 — "Abortion Injunction Set Aside as Husband, Wife Reach Accord".

⁴² *Divorce Act*, R.S.C. 1970, c. D-8, s. 2.

⁴³ In *Caller v. Caller*, [1968] P. 39, a somewhat analogous though much broader term, "child *accepted* as one of the family" [emphasis added] formerly found in the English *Divorce Act* has been held to justify child support payments from a husband who married his wife knowing that she was pregnant by another man even though he left her before the child was born.

But more recently in *A. v. A.*, [1974] 1 All E.R. 755, the present statutory requirement that the child be *treated* as a child of the family was held in a similar fact situation not to include an unborn child on the basis that treatment means "act or behave towards" and a man could not behave towards an unborn child. The child was held not to be a child of the family.

⁴⁴ [1943] O.W.N. 47, *aff'd* at 297.

⁴⁵ R.S.O. 1970, c. 505.

⁴⁶ R.S.O. 1970, c. 164.

benefit was not questioned at trial or in the Ontario Court of Appeal. A spokesman for the Workmen's Compensation Board in Ontario has stated that as a matter of practice the Board takes a common-sense approach to the question and, provided that the child was conceived at the time of his father's death and is subsequently born alive, he will be classified as a dependant.

In *Gidding v. Cdn. Northern Railway Company*, a decision of the Saskatchewan Queen's Bench, Appellate Branch which dealt with an award to a widow and child under Fatal Accidents Act-type legislation, Lamont, J.A. observed:

The child was unborn at the date of the death, but that appears to be immaterial so long as the action is for the benefit of the child.⁴⁷

Other legislation conferring a survivorship benefit on dependants is *The Compensation for Victims of Crime Act*⁴⁸ which enables a Board to award compensation to the dependants of a victim of the commission of a crime of violence under the *Criminal Code*. This Act defines "dependant" so as to include "a child of the victim born after his death."⁴⁹

D. TORTS

In general, the law of negligence provides the same protection to children as to adults. Injured children have a right of action where their injuries have been caused because a person under a duty to exercise reasonable care towards them has failed to do so.⁵⁰ Before a claim in tort for negligence can be allowed, there must be a duty of care owed by the defendant to the plaintiff, a breach of that duty, and resulting damage to the plaintiff.⁵¹ The scope of the duty is said to be limited to foreseeable injury.⁵² But how wide the scope of duty in negligence is to be cast, depends ultimately on judicial policy in response to society's demands for protection from the carelessness of others.⁵³

There has been an increasing tendency for the courts in a number of common law jurisdictions to allow claims for compensation for injuries sustained by children *en ventre sa mere*. The most recent reported Canadian case in this area is *Duval v. Seguin*,⁵⁴ a decision of the Ontario High Court which was upheld on appeal. The action arose as a result of two consecutive automobile accidents. A car driven by Gaetan Duval and carrying as passengers Maurice Duval and his wife Therese, who was 31 weeks pregnant, collided with an automobile driven by Seguin. After the initial collision, the Duval car

⁴⁷ [1920] 2 W.W.R. 849 (Sask. C.A.) at 856; see, also, *Villar v. Gilbey*, [1907] A.C. 139 and *Orrell Colliery Co. v. Schofield*, [1909] A.C. 433.

⁴⁸ S.O. 1971, c. 51.

⁴⁹ *Id.*, s. 1 (1)(c).

⁵⁰ The Ontario Law Reform Commission, *Report on Family Law, Part I: Torts* (Toronto, 1969) at 81.

⁵¹ *Duval v. Seguin*, [1972] 2 O.R. 686 at 700, aff'd (1973), 1 O.R. (2d) 482.

⁵² *Supra*, note 49.

⁵³ P. A. Lovell and R. H. Griffith-Jones, *The Sins of the Fathers — Tort Liability for Pre-Natal Injuries* (1974), 90 L.Q.R. 531 at 534.

⁵⁴ *Supra*, note 50.

was struck a second time while Therese was still in the car trying to get out. Three weeks later the child, Ann Duval, was prematurely born weighing 2 lbs. 14¼ oz. at birth. At 19 months, the child was obviously spastic; her very abnormal gait was due to a cerebral defect or incapacity and her progress in talking was also abnormally slow.

In deciding that the child had a right to damages for pre-natal injury, Fraser, J. dealt with a number of issues which could previously have been impediments to recovery.

1. *Lack of Precedent*

Since there was no decisive authority in Ontario as to whether a person could recover damages for pre-natal injuries, Fraser, J. reviewed the legal position of unborn children in other jurisdictions and noted that, while initially the weight of authority had been against recovery, particularly in the United States, these old rules were now almost completely reversed.⁵⁵ He then turned to the Canadian authorities.

In the 1922 case of *Smith v. Fox*,⁵⁶ the plaintiff brought an action as the next friend of his unborn infant for damages resulting from an automobile accident in which his wife, then pregnant, was involved. Riddell, J. dismissed the action with respect to the as yet unborn child but without prejudice to any action to be brought after its birth. In so doing, he noted that, although he was not called upon to decide whether an action would lie at the suit of an infant for injuries received while *en ventre sa mere*, he could see no justification in reason or in law why it should not, provided that the child is born alive and there is injury capable of being estimated pecuniarily. It is to be noted that he felt there could be no assessment of damages before the birth and separate existence of the child. The case of *Duval v. Seguin* fulfilled these requirements.

The 1933 Supreme Court of Canada decision of *Montreal Tramways v. Leveille*,⁵⁷ an appeal based on the Quebec Civil Code and hence not binding on common law provinces, nevertheless carried considerable weight in the *Duval* decision. In that case a child *en ventre sa mere*, subsequently born with club feet, was found on the facts to have been injured by the fault of the defendant who had caused its mother to fall while alighting from a tram car. Although the weight of authority seemed at that time to be against granting recovery in such a case,⁵⁸ Lamont, J. (with whom Rinfret and Crockett, JJ. concurred) found in favour of the plaintiff on the basis of natural justice:

If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If the right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and incon-

⁵⁵ *Id.* at 697.

⁵⁶ [1923] 3 D.L.R. 785 (Ont. S.C.).

⁵⁷ [1933] 4 D.L.R. 337 (S.C.C.).

⁵⁸ *Supra*, note 50 at 699.

venience therefor. To my mind it is but *natural justice* that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.⁵⁹ [emphasis added]

2. *Arguments by Analogy: Recognition of The Unborn Child in Other Areas of Law*

In *Montreal Tramways v. Leveille*⁶⁰ and in *Duval v. Seguin*,⁶¹ judicial notice was taken of the fact that in some areas the law has long recognized an unborn infant as a person. In the former case, Lamont, J. referred to two express provisions of the Quebec Civil Code which declared that, in certain specific instances with respect to property, a child *en ventre sa mere* would be deemed to be born whenever it was in its interests to be so deemed. He also referred to the words of Grose, J. in construing a will under the common law, in *Doe d. Lancashire v. Lancashire* to the effect that:

I know of no argument, founded on law and natural justice in favour of the child who is born during his father's life that does not equally extend to a posthumous child.⁶²

On the other hand, Smith, J., the dissenting judge in the *Montreal Tramways* case, considered that the civil law rule as to unborn children referred to their property rights only and therefore the fiction could not be given general application.⁶³

In his article, *The Unborn Child*, Professor Winfield commented on the inapplicability of this property law fiction to tort law. He reasoned that where the tort is to property it seems unsound to argue this and, furthermore, that a claim in tort could be supported without resting the whole concept on an analogy to property law. However, he urged that recognition in tort law be given to the rights of the unborn child because it would be anomalous if the law were to allow a child to acquire property before he was born and yet would not allow him a right to compensation for personal injuries before birth: "To limit this proposition to property rights is to rate property higher in the scale of values than life and limb."⁶⁴ Fraser, J. gave weight implicitly to these arguments when deciding *Duval v. Seguin*.

3. *Is There a Duty of Care Owed?*

The duty of care issue was another problem with which Fraser, J. had to grapple in extending the protection of tort law to the unborn.⁶⁵ There were two elements to this problem.

(a) Not a Person at Time of Injury

⁵⁹ *Supra*, note 56 at 345.

⁶⁰ *Id.* at 343-44.

⁶¹ *Supra*, note 50 at 698.

⁶² 5 T.R. 49 at 63.

⁶³ *Supra*, note 1 at 289.

⁶⁴ *Id.* at 293.

⁶⁵ *Id.*

The company's contention in the *Montreal Tramways* case was that an unborn child was merely a part of its mother; it had no separate existence and therefore no status as a person to maintain an action. This argument was rejected by Lamont, J. who found that when the infant was subsequently born alive and viable it then acquired all the rights of action which it would have had if actually in existence at the date of the accident.⁶⁶

When *Duval v. Seguin* was decided, the concept of potential duty, developed in the products liability cases,⁶⁷ could readily be extended to the area of duty owed to the unborn. Cases such as *Donoghue v. Stevenson*,⁶⁸ *Grant v. Australian Knitting Mills, Ltd.*⁶⁹ and *Dorset Yacht Co. v. Home Office*⁷⁰ were specifically referred to in *Duval* as authority for the proposition that it is unnecessary for the damages to coincide in time or place with the wrongful act or default. In the first two cases, the negligent act, although committed at the time of manufacture, did not crystallize until the product was used and damage suffered.⁷¹ As a result, Fraser, J. found it unnecessary to consider whether the unborn child was a person in law at the time of the accident or at what stage she became a person:

For negligence to be a tort there must be damages. While it was the fetus or child en ventre sa mere who was injured, the damages sued for are the damages suffered by the plaintiff Ann *since birth* and which she will continue to suffer as a result of that injury.⁷² [emphasis added]

While the result of this decision goes no further than to award damages in tort to a child since birth, the question of whether damages for injury to the fetus could have been claimed appears to have been left open.

(b) Foreseeability

The requirement of foreseeability does not refer to the identification of the particular individual who was injured but to the identification of a class of persons to which the plaintiff belongs.⁷³ Fraser, J. found that the plaintiff Ann Duval was one of a class within the area of foreseeable risk:

Procreation is normal and necessary for the preservation of the race. If a driver drives on a highway without due care for other users it is foreseeable that some of the users of the highway will be pregnant women and that a child en ventre sa mere may be injured. Such a child therefore falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid.⁷⁴

⁶⁶ *Supra*, note 56 at 344.

⁶⁷ *Supra*, note 50 at 700.

⁶⁸ [1932] A.C. 562.

⁶⁹ [1936] A.C. 85.

⁷⁰ [1970] A.C. 1004.

⁷¹ In the Australian case of *Watt v. Rama*, [1972] V.R. 353, the same conclusion based on this products liability analogy was reached in a fact situation similar to *Duval*.

⁷² *Supra*, note 50 at 701.

⁷³ *Supra*, note 52 at 534.

⁷⁴ *Supra*, note 50 at 701.

It is unnecessary, "to stipulate in advance the precise manner in which the unborn child's injury is foreseeable or its exact extent."⁷⁵

4. Establishing a Causal Link

While Fraser, J. acknowledged the difficulty of establishing a causal link between the accident and the type of injury suffered, he was not prepared to deny the plaintiff status to sue on the basis that the deformity suffered by the child *en ventre sa mere* would in all probability have occurred in any event. This was a problem of proof. Nutritional deficiencies, maternal age and health, and psychological elements are among the factors which may be relevant to the intra-uterine development of the infant.⁷⁶ The precise mechanism by which such environmental agents exert their influences is, in many cases, unknown.⁷⁷ One author has stated that five per cent of all children born have some congenital abnormality but the deformities of only two per cent of the five per cent can be attributed to a definite environmental agent.⁷⁸

In both *Montreal Tramways* and *Duval v. Seguin*, there was conflicting medical evidence as to the cause of the child's abnormality. It was argued that to find the defendants liable would be to encourage many fraudulent lawsuits. In both cases, however, this contention was soundly rejected because of advances in medical science and the fact that the courts now have to consider many similar problems involving the determination of damage in relation to cause.

E. CONCLUSION

As we have seen, the unborn child is accorded various rights and protections for various purposes under Canadian Law, but these rights and protections appear to be conditional on a legal personality being acquired when the fetus is subsequently born alive. If no legal personality comes into existence, then no action can lie. The damage is considered to occur on and after birth⁷⁹ and the time for commencement of the action does not begin to run until birth.⁸⁰

Whether recovery will be granted for the "wrongful death" of a fetus which is injured as a result of the defendant's negligence and dies *in utero* or is stillborn depends on the approach taken to the question of the fetus's legal personality. If the fetus itself is granted legal personality then its estate should be able to recover for its wrongful death and under *The Devolution of Estates Act* in Ontario, or similar Acts,⁸¹ the father, mother, brothers and sisters of

⁷⁵ *Supra*, note 52 at 534.

⁷⁶ D. A. Gordon, *The Unborn Plaintiff* (1965), 63 Mich. L.R. 579 at 604 *et seq.*

⁷⁷ *Id.* at 606.

⁷⁸ A. Samuels, *Case Comment: Duval v. Seguin* (1974), 12 Alta. L. R. 266 at 267.

⁷⁹ P. J. Rowe, *The Unborn Child* (1973), New Law Journal 96; *Watt v. Rama*, [1972] V.R. 353 at 371.

⁸⁰ Rowe, *Id.*

⁸¹ *E.g.*, R.S.O. 1970, c. 129, s. 31.

the fetus, as the beneficiaries of the estate, would all be entitled to an equal share of the damages. If, however, the fetus is not accorded legal personality *in utero*, there can be no question of its having an estate. However, the issue of whether its parents can recover for their loss of the expectation of a child and for loss of his services because of his wrongful death remains open. Even if the fetus is not accorded legal personality, the parents could still be allowed recovery for loss of their expectation interest stemming from the wrongful death of the unborn child and in fact such actions have been allowed in some American jurisdictions.⁸²

The approach taken to allowing recovery in the *Duval* case and in the similar Australian case of *Watt v. Rama*⁸³ avoids any consideration of the legal status of the fetus. It requires only that a causal link between the plaintiff's condition and the defendant's wrongful action be established. Once born alive, the child has legal personality on which to base its claim for damage presently being suffered because of its prenatal injuries. This approach to recovery is similar to one which has been labelled "the causative approach"; it dictates that if a fetus is stillborn, there is no right of action because the damage is deemed to occur not at the time of the negligent act but at the time of birth. Since there is no birth, there is no damage. The granting of legal rights in the causative approach is based on the view that such rights are a benefit to the infant. If the fetus is dead, it could not possibly be to its advantage to have a right of recovery. The advantage of an approach which does not confer legal personality until birth is that it avoids conflict with any abortion legislation.

If there be no recovery for the unborn's wrongful death, either directly through its estate or indirectly through its parents' loss of expectation, then it would be cheaper for a defendant to inflict injury sufficient to cause the death of the unborn rather than simply to damage him. In this way, the defendant could escape a claim for damages. Such an anomaly in the law is offensive. The fundamental basis of tort law is compensation for loss suffered;⁸⁴ neither the concept of punitive damages nor windfall gain are central themes in allowing tort damages.⁸⁵ Although it can be argued that the estate of the unborn should have no claim for loss of life expectancy since there was no actual loss suffered by the unborn, the parents of the unborn have suffered a real loss of expectation and potential services. Although it would be difficult to assess the quantum of such damages, it has been suggested that one could subtract the potential expenses of bringing up a child from his potential earning power, bearing in mind the fact that a child has an obligation to support his parents

⁸² *O'Neill v. Morse*, 188 N.W. (2d) 785 (1971), see also R. E. Kruger, *Wrongful Death and the Unborn: An Examination of Recovery after Roe v. Wade* (1973-74), 13 J. Family Law 99.

⁸³ *Supra*, note 78.

⁸⁴ *Supra*, note 75 at 595.

⁸⁵ *Id.*

in old age.⁸⁶ Relevant factors in assessing potential earning power would be the parents' social and economic status and the employment of other children in the family. Although no recovery of this kind has yet occurred in Canada, an action for damages for wrongful death has been initiated in the Northwest Territories by the father of an unborn child against Gateways Aviation Ltd.⁸⁷ The Statement of Claim alleges that the airplane crash which caused the loss of the fetus was due to the defendant's negligence. Two separate grounds of damages are alleged: the father claims for his own loss stemming from the unborn's wrongful death on the basis that he has been deprived of the love and enjoyment as well as the services of the said child; the estate of the unborn infant claims damages for loss of life expectancy, alleging that he was deprived of a potentially full, happy life. The defendants, in turn, state that in law no action is maintainable by a parent for his loss of expectation on behalf of the unborn child for its "wrongful death."

Fraser, J. in *Duval v. Seguin* specifically refrained from expressing any opinion as to what, if any, legal rights a child *en ventre sa mere* has. He simply concluded that many difficult problems in this area of the law remain to be resolved.⁸⁸ If a case were to be made out in favour of allowing the *estate* of a fetus to maintain an action for wrongful death, analogy to the area of criminal law would appear to be helpful. While the *Criminal Code* does not consider the fetus to be a person until "birth", nevertheless one who causes an abortion except where it is for the health or safety of the mother is guilty of a crime. In *Montreal Tramways v. Leveille*, Lamont, J. stated that while in some cases there may be no analogy between crime, based on public redress, and tort, based on private redress, in many cases the two were merely different aspects of the same set of facts:

The wrongful act which constitutes the crime may constitute also a tort, and if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize separate existence for the purpose of redressing the tort.⁸⁹

The New Biology emphasizes that life is a continuing process and that it is impossible to pinpoint the exact time when life begins.⁹⁰ Some believe that life begins at conception, some believe it does not begin until birth and some argue that it occurs at some arbitrary date in between. Even if the fetus were accorded legal personality from conception for some purposes in law (assuming the moment of conception can be determined), this does not mean that

⁸⁶ Kruger, *supra*, note 81 at 106.

⁸⁷ The Toronto *Sun*, August 8, 1973, "Now a Law Suit that is termed Legal Dynamite"; August 9, 1973, Statement of Claim and Statement of Defence obtained through the courtesy of James Karswick, Barrister and Solicitor. See, also R. Echlin *The Rights of the Unborn Plaintiff* (1974), 32 U. of T. Faculty of Law Rev. 75 at 80; *Chrisafogeorgis v. Brandenburg*, No. 45060, 304 N.E. (2d) 88 (1973).

⁸⁸ *Supra*, note 50 at 702.

⁸⁹ *Supra*, note 56 at 344.

⁹⁰ D. W. Brodie, *The New Biology and the Pre-natal Child* (1970), 9 J. Family Law 391 at 406.

legal personality is an inherent characteristic of the fetus from the point of conception onward.

It must be recognized that, at the present state of medical science, according to the fetus legal personality is an arbitrary decision. The point chosen will vary depending on the ends sought to be achieved by according legal personality in the given context. Thus, for the purposes of tort law the fetus may be granted legal personality retroactively only if born alive. For the purposes of abortion law, the fetus may be denied legal personality until some stage in its development when this status is arbitrarily granted. This point may be live birth, thereby admitting the possibility of abortion on demand. However, other policy factors can and do intervene, resulting in regulation of abortion prior to the granting of legal personality. In *Roe v. Wade*,⁹¹ a recent decision of the United States Supreme Court, Blackmun, J. held that since the word "person" under the Constitution does not include the unborn, a woman has an unqualified right to choose to terminate her pregnancy in the first trimester. Thereafter, the danger that this operation presented to the mother was such that the state had a right to intervene and regulate abortion in order to protect its vested interest in the mother's health. Further, in determining whether the health of the mother was endangered, *Doe v. Bolton*,⁹² another United States Supreme Court decision, makes it clear that the danger need not be just to the mother's life itself but that all considerations relating to her well-being including her emotional, psychological and familial state were relevant. This judgment reflects the policy decision that the quality of a woman's life should play a central role in abortion decisions and this, in turn, affects the policy issue as to when legal personality should be granted.

The evolution of the rights of the unborn child presently necessitates, and will continue to require, a balancing of the competing social policy interests. Such matters as changing social attitudes regarding the amount of population desirable for this country, the demand of women's rights groups that women alone be masters of their fate,⁹³ and the increasing recognition of the father's equal right to custody of children will influence the extent to which the potentiality of life will be protected.

The law pertaining to the unborn also has implications in other contexts, such as the likelihood of success of a "wrongful life" action.⁹⁴ Some have proposed that an infant should be allowed to claim damages because the quality of its life is such that it should never have been allowed to be born. But given the current state of the law in Canada, the probability of such a right of action being recognized is indeed slim. Whether the unborn child, once born alive, should have the right to sue its parents when an injury sustained while *en ventre sa mere* results from their negligence is another interesting question. In Ontario, the passage of *The Family Law Reform Act*⁹⁵ makes

⁹¹ 410 U.S. 113 (1973).

⁹² 93 S. Ct. 739 (1973) at 747.

⁹³ *Zepeda v. Zepeda*, 190 N.E. (2d) 849 (1963), (Ill. C.A.).

⁹⁴ G. Tedeschi, *On Tort Liability for Wrongful Life* (1966), 1 Israel L. R. 513.

⁹⁵ S.O. 1975, c. 41, s. 3 & 4, proclaimed in force July 10, 1975.

the likelihood of such an action succeeding at least probable, since, under s. 3,⁹⁶ a child is not disentitled from bringing an action against a parent and, under s. 4,⁹⁷ a person once born alive is not prevented from suing for damages due to injuries incurred before his birth.

The law relating to the unborn remains in a state of flux and with advances in scientific knowledge and changes in societal values, further developments in this area of the law should be forthcoming.

⁹⁶ S. 3 — No person shall be disentitled from bringing an action or other proceeding against another for the reason only that they stand in the relationship of parent and child.

⁹⁷ S. 4 — No person shall be disentitled from recovering damages in respect of injuries incurred for the reason only that the injuries were incurred before his birth.

